Supreme Court, U.S.
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No. 93-1700

In The

Supreme Court of the United States

October Term, 1993

DAVID SNOW, LINDA SNOW, JASON SNOW and KEVIN SNOW,

Petitioners,

vs.

HARNISCHFEGER CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether it would be improvident to issue a writ of certiorari in this case wherein (a) the United States District Court for the District of Massachusetts correctly applied a Massachusetts statute of repose in a personal injury case to bar the petitioners' tort claims; (b) the United States Court of Appeals for the First Circuit correctly applied Massachusetts law and affirmed the district court's decision and (c) the court of appeals reasonably exercised its discretion and denied the petitioners' request (not made until shortly before oral argument) to certify questions of state law to the Supreme Judicial Court of Massachusetts because it found controlling precedent sufficient to render a decision based upon state law?

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STATEMENT OF THE CASE

During 1973-74, the respondent, Harnischfeger Industries, Inc. ("Harnischfeger") designed, engineered and constructed two overhead cranes for a trash incineration and power generating plant located in Saugus, Massachusetts. The cranes were custom engineered and designed by Harnischfeger to exacting specifications supplied by the trash plant's owner, Refuse Energy Systems Co. ("RESCO") and an architectural and engineering firm, Rust Engineering Co. ("RUST"). The plant became operational in 1975.

In December, 1987, some thirteen years after Harnischfeger had provided its design and engineering services, and twelve years after the trash plant had become operational (with the cranes functioning as integral components) the petitioner, David Snow, was injured when one of the cranes struck his hand. Almost three years later, in December, 1990, Snow commenced a personal injury tort claim against Harnischfeger in the Massachusetts Superior Court. Harnischfeger removed the case to the United States District Court for the District of Massachusetts. After a two year period of factual discovery, the district court granted summary judgment in Harnischfeger's favor on the basis of a Massachusetts statute of repose. Appendix D. The statute granted immunity from suit to persons engaged in the design, planning and construction of improvements to real property for all personal injury claims occurring more than six years after completion of the improvement.[1] M.G.L.A. c. 260, §2B.

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1. Action [sic] of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property, other than that of a public agency as defined in section thirty-nine A of chapter seven shall be commenced only within three years next

(Cont'd)

Snow never requested that the district court submit certified questions of law to the Massachusetts Supreme Judicial Court ("SJC"), despite the existence of a procedure for doing so.[2] Supreme Judicial Court Rule 1:03, § 1. In fact, he argued existing Massachusetts law was dispositive of the case. Appendix A at 16a. It was not until shortly before oral argument took place in the United States Court of Appeals for the First Circuit that Snow requested certification. The court of appeals denied Snow's motion for certification and affirmed the decision of the district court stating it was "satisfied that sufficient guidance is available [based upon existing Massachusetts precedent] and certification is inappropriate under the circumstances of this case." Appendix A at 16a.

Snow now petitions this Court to grant a writ of certiorari to review findings of fact and construction of state law made by the district court and the court of appeals.

(Cont'd)

after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.

2. This court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, or the highest appellate court of any other state when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court.

SUMMARY OF ARGUMENT

This Court should not grant further review because there exists no compelling or important reason to do so. The petitioner's tort claim was dismissed by application of existing state law to findings of undisputed facts made by the district court. The court of appeals conducted a *de novo* review of the district court's judgment and also found controlling precedent sufficient to result in dismissal of the petitioner's claims. In the exercise of its sound discretion, the court of appeals also declined the petitioner's request to certify questions of law to the SJC. Under the circumstances, no compelling reason whatever exists for this court to undertake further review of the lower courts' factual findings and construction of the Massachusetts statute of repose.

REASONS FOR DENYING THE WRIT

While discretionary, review by writ of certiorari normally is not granted in the absence of "special and important reasons therefor" or, in circumstances where a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Rule 10.1(a) of the Rules of the Supreme Court. When a federal court's determination of state law unconnected to any constitutional or federal law question is challenged, review is particularly inappropriate and exceedingly rare. Great deference properly is accorded by this Court to the interpretation and application of state law by the district courts and courts of appeals which are skilled in the substantive law of the particular states. *See, e.g., Granberry v. Greer,* 481 U.S. 129, 136 n. 9, 107 S. Ct. 1671, 1676 n. 9, 95 L. Ed. 2d 119 (1987) (Court declined to review court of appeals determination that petitioner had not exhausted state remedies); *Pembaur v. City of Cincinatti,* 475 U.S. 469, 484 n. 13; 106 S. Ct. 1292, 1301 n. 13, 89 L. Ed. 2d 452 (1986) (Court declined to

review court of appeals determination of state law consistent with accordance of "great deference to the interpretation and application of state law by the court of appeals"); *Regents of Univ. of Michigan v. Ewing;* 474 U.S. 214, 224 n. 10, 106 S. Ct. 507, 513 n. 10, 88 L. Ed. 2d 523 (1985) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable", quoting from *Propper v. Clark,* 337 U.S. 472, 486-87, 69 S. Ct. 1333, 1342, 93 L. Ed. 1480 (1949)). This deference reflects the Court's belief that "district courts and courts of appeal are better schooled in and more able to interpret the law of their respective States". *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 500, 105 S. Ct. 2794, 2800, 86 L. Ed. 2d 394 (1985). *See also, Haring v. Prosise,* 462 U.S. 306, 314 n. 8, 103 S. Ct 2368, 2373, 76 L. Ed. 2d 595 (1983); *Pierson v. Ray,* 386 U.S. 547, 558 n. 12, 87 S. Ct. 1213, 1220, 18 L. Ed. 2d 288 (1967).

Similarly, where consistent findings of fact by two lower courts are challenged, further review should not be undertaken absent extraordinary circumstances or a very obvious and exceptional showing of error. *See, e.g., Goodman v. Lukens Steel Co.,* 482 U.S. 656, 655, 107 S. Ct. 2617, 2623, 96 L. Ed. 2d 572 (1987) ("[B]oth courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task."); *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.,* 468 U.S. 85, 98 n. 15, 104 S. Ct. 2948, 2959, 82 L. Ed. 2d 70 (1984) ("In accord with our usual practice, we must now accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals."); *accord, Branti v. Finkel,* 445 U.S. 507, 512 n. 6, 100 S. Ct. 1287, 1291, 63 L. Ed. 2d 574 (1980).

The district court dismissed Snow's tort claim after a careful review of the affidavits and deposition testimony submitted. It

made factual findings and rejected Snow's assertion that genuine, material issues of fact were in dispute. As the district court explained, Snow's contention that genuine issues of material fact existed really amounted to an "argument about how to apply law to established facts." Appendix D at 20a-21a, n. 3. The court of appeals conducted a *de novo* review of the district court's findings. It also found no merit to Snow's assertions that genuine issues of material fact existed. "As the district court aptly stated, the Snows' contention is 'merely [an argument] about how to apply law to the established facts.' To the extent there is a dispute, it is immaterial to the disposition of the action." Appendix B at 8a.

Based upon the established, undisputed facts, neither the district court nor the court of appeals had any difficulty determining that the Massachusetts statute of repose barred Snow's claims. Both decisions were premised solely on the substantive tort law of Massachusetts; no federal or constitutional questions were raised. This court should not conduct yet a third *de novo* review of the facts, nor for a third time apply the substantive tort law of Massachusetts to those facts. Any further review is unjustified.

Disappointed with the district court and court of appeals factual findings and application of state law to dismiss his claims, Snow finally complains that the court of appeals erred when it declined to certify questions of law to the SJC. As is clear from the record however, certification would have been inappropriate under the applicable SJC standard. Even if certification was permissible, use of the procedure resides in the sound discretion of the federal court and its reasonable exercise of this discretion should not be disturbed.

The SJC permits certification of determinative issues where "it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Judicial Court." Supreme Judicial

Court Rule 1:03, § 1 (1986). The SJC has interpreted the scope of the Massachusetts statute of repose in no fewer than seven cases. *See, e.g., Klein v. Catalano,* 386 Mass. 701 (1982); *Salinsky v. Perma-Home Corp.,* 15 Mass. App. Ct. 193 (1983); *Milligan v. Tibbetts Engineering Corp.,* 391 Mass. 364 (1984); *Anthony's Pier Four, Inc. v. Crandall Dry Dock Engineers, Inc.,* 396 Mass. 818 (1986); *Dighton v. Federal Pacific Electric Co.,* 399 Mass. 687 (1987); *Conley v. Scott Products, Inc.,* 401 Mass. 645 (1988); *Parent v. Stone & Webster Engineering Co.,* 408 Mass. 108 (1990); *McDonough v. Marr Scaffolding Co.,* 412 Mass. 636 (1992). The court of appeals also had occasion to construe the statute in *Cournoyer v. MBTA,* 744 F.2d 208 (1st Cir. 1984). While Snow initially argued to the district court that the *Dighton* case was dispositive, shortly before oral argument in the court of appeals he claimed, "local law on this question has not been clearly determined." The court of appeals flatly rejected this contention stating its satisfaction that "sufficient guidance is available and certification is inappropriate under the circumstances of this case." Appendix B at 16a.

While in some circumstances certification of state law questions would be appropriate, it is by no means required. Where questions of state law are not uncertain, certification is unnecessary and would amount to a waste of time and expense. *City of Houston v. Hill,* 482 U.S. 451, 470-71, 107 S. Ct. 2502, 2514-15, 96 L. Ed. 2d 398 (1987). Even in cases where there is some doubt as to the interpretation of state law, certification is not obligatory. For example, the First Circuit has declined to certify where it is convinced of how the state court would apply state law, even in the absence of a direct answer. *Russell v. Salve Regina College,* 938 F.2d 315, 318 (1st Cir. 1991). As this Court has aptly said,

> We do not suggest that where there is doubt as to local law and where certification procedure

> is available, resort to it is obligatory . . . Its use in a given case rests in the sound discretion of the federal court.

Lehman Bros. v. Schein, 416 U.S. 386, 390, 94 S. Ct. 1741, 1744, 40 L. Ed. 2d 215 (1974). Stated another way,

> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used. The question of whether certification [of a particular case] . . . would have advanced the goal of correctly disposing of [the] litigation on the state law issue is one which I would leave, and I understand that the Court would leave, to the sound judgment of the court making the initial choice.

Id. 416 U.S. at 395, Rehnquist, J., concurring.

As implicitly suggested by *Lehman Bros.*, and as explicitly stated by the First Circuit, a party's failure (such as Snow's) to suggest certification until a late stage in the proceedings considerably weakens his insistence on certification. *Fischer v. Bar Harbor Banking & Trust Co.*, 857 F.2d 4, 8 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018, 109 S. Ct. 1135, 103 L. Ed. 2d 2196 ("Though the failure to raise the issue would not necessarily prevent our certifying at this late stage, it considerably weakens plaintiff's insistence on his right to certification.") Therefore, the court of appeals would have been justified in rejecting Snow's request for certification on the grounds that it was untimely. In any event, the lateness of the request raised substantial further doubt as to its appropriateness.

The court of appeals found ample controlling precedent and guidance so as to apply the Massachusetts statute of repose to Snow's claims in this case. While certification was inappropriate and unnecessary, the court of appeals carefully considered Snow's late request to do so. As there was no abuse of discretion or manifest error, its decision to decline Snow's request should not be disturbed by this Court.

CONCLUSION

Massachusetts law describing the extent of the protection from tort suits afforded to persons engaged in the design, planning and construction of improvements to real property is comprehensive and clear. The factual record before the district court and the court of appeals was equally comprehensive and clear. Presented with this factual record, and after careful consideration of binding precedent, the district court correctly applied the statute of repose and held that Snow's claims were barred. The court of appeals, in the exercise of its sound discretion, declined to certify questions of law to the SJC and correctly affirmed the district court's decision. There is no important or compelling reason for this Court to conduct any further review.

Respectfully submitted,

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